(133)

Michigan Contested Election Case.

JOHNS HOPKINS UNIVERSITY

CASE
JK1359
.36th
M5

MICHIGAN CONTESTED ELECTION CASE.

—o—

HOWARD VS. COOPER.

—o—

ARGUMENT OF CONTESTANT.

—o—

The First Congressional District of Michigan is composed of *four* counties *only*. They are—Jackson, Livingston, Washtenaw, and Wayne.

The election in question was held on the 2d day of November, 1858. The aggregate vote cast for Representative in Congress was 26,189. (*Vide printed testimony, pages* 77—81, *inclusive.*)

They were cast as follows, viz: For George B. Cooper, 13,123 votes; for William A. Howard, 13,048 votes; scattering, 18 votes. Plurality for sitting member, 75 votes. (*Vide certificates of Secretary of State, pages* 77—81.)

Upon this plurality, the certificate was issued to sitting member on the 30th November, 1858.

On the 28th day of December, 1858, the notice of contest was served upon sitting member.

The answer was served on the 26th or 27th of January, 1859, and the time for taking testimony under the law of Congress expired on the 27th of March, 1859.

All the laws of Michigan regulating elections, and applicable to this case, are in vol. I, Compiled Laws, chapter 6, commencing at page 103.

There is no testimony relating to any voting place in Jackson, Livingston, or Washtenaw counties.

The whole contest is in regard to elections in Wayne county.

There are in Wayne county 28 *voting places*, viz: 18 towns, and 10 wards in the city of Detroit.

A detailed statement of the official vote of all these 28 towns and wards is given on pages 51 and 52, in the deposition of Mr. Throop, the County Clerk, and the official custodian of the election returns.

The whole of the testimony relates to two towns and five wards, and two of these wards are only referred to incidentally; so we may assume, with substantial accuracy, that we are only concerned in this investigation with two organized towns, and three wards of the city of Detroit.

The testimony is far from being voluminous, and as it all relates to these *five voting places*, and as all the statutes of Michigan bearing upon the subject are contained in a single chapter, it would seem your task may be made comparatively easy, and I hope satisfactory.

The voting places to which the testimony refers are the following, viz: The *second, fourth, and fifth wards* of the city of Detroit; the towns of "Grosse Poi te" and "Van Buren."

The case presents *four* distinct *points* or *aspects*, each independent of all the others; and I submit, if either one be proved, it establishes my right to "*the seat.*"

First. The Fourth Ward election.

Second. The Second Ward election.

Third. The "Grosse Pointe" election.

Fourth. The number of illegal and fraudulent votes cast for sitting member was greater than his returned majority in the whole district.

All the testimony tends to establish some one of these four propositions.

I respectfully ask the close attention of the committee to the testimony bearing upon these propositions in their order.

First. As to the Fourth Ward election.

The official returns show, page 51, (Throop's Testimony)—

For sitting member - - - - -	492 votes.
For contestant - - - - - -	230 "

Both should be deducted.

I invite the attention of the committee to the notice of contest, the 9th section, or general head. Also to testimony of Tillman, pages 44 and 55. Also, Wells, page 49.

An examination of the testimony referred to will show that the allegations in the notice are *fully proved.*

I submit, the 492 votes should be deducted from the returned number of the sitting member, and the 230 votes should be deducted from the returned vote of the contestant, for the following reasons:

1. Because two different ballots, alike in outside appearance, were put in the same box, and each elector was permitted to deposit two of these tickets, so folded as not to be distinguishable from each other, with no check or tally list by which it could afterwards be determined whether any one of the voters voted two State and Congressional tickets, and no city ticket, or *vice versa.* (*Vide Tillman's Testimony. Also, Wells.*)

The Inspectors could not determine it at the time, nor would their poll lists show it afterwards. Three hundred and sixty-one *voters* may have cast the whole 722 votes for Representative, and some other 361 voters cast all the city tickets. It can never be known whether the whole Representative vote was cast by 361 men, or by 722 men, or

by any one of the intermediate numbers. It was optional with every voter to vote two of *one kind*, or two of the *other kind*, or one of *each*.

2. Because an unsworn Inspector was substituted, at five o'clock, P. M., for the one regularly sworn in the morning, in *direct violation* of the statute of Michigan. (*Vide sec.* 19, *chap.* 6, *C. L. Mich.*) The box containing the ballots, in an unsealed condition, was kept constantly in the hands of this unsworn Inspector, contrary to the statute, (*vide secs.* 31, 32, 35, *ib.;*) while the pretended poll lists (a mere list of names, with nothing to indicate who voted, or who was challenged, or what tickets, whether State or city, or how many of each) were carried to various parts of the city, exposed in private dwellings and public stores, in utter contempt and violation of the statutes of Michigan in such case made and provided. (*See sec.* 31.)

3. Because, as already intimated, there were no sufficient poll lists kept—a mere string of names, but nothing to indicate who voted and who did not vote, who were challenged and who were not challenged, or what they voted for—whether State officers or city officers. They did not agree even in the list of names. Nor were they made to agree, except in the most arbitrary way—that is, by copying the largest outright, and that not in the presence of the Board. (*Vide sec.* 36.)

4. Because the poll lists, such as they were, were not locked up in the box as the law requires, but different ones carried to different places in the town, and not only left exposed day after day, but purposely *marked*, *defaced*, and altered, and this not in the presence of the Board, and not by order of the Board. (*Vide secs.* 31, 32.)

5. Because the box was not sealed and kept as the law requires. (*Vide secs.* 26, 31, 32, 35.)

Second. The Second Ward election.

The official returns show, in this ward—

For sitting member - - - - -	278 votes.
For contestant - - - - -	202 "

(*Vide page* 51 *of testimony.*)

I submit, the 278 votes should be deducted from votes returned for sitting member, and the 202 votes should be deducted from the votes returned for contestant, for the reason the polls in this ward were in the possession of a gang of lawless men throughout the entire day—*prize-fighters*, *bullies*, *and loafers*, brought into the ward for the double purpose of voting illegally themselves, and preventing legal voters from voting, unless they would vote the Democratic ticket. (*Vide testimony of Larned*, *pages* 12, 26; *Hornbeck*, 29; *George Jackson*, 39; *Stebbins*, 41.)

I invite the close attention of the committee to the testimony on this point.

It is a small ward, and the legal voters are well known.

The evidence shows that for the last hour, while there were Republicans present trying to vote, it was impossible to vote.

I state my conviction, that of the last forty-four names on the poll list in this ward, there is but one Republican, and of the last eighty-eight names there are but twenty-four whom I know to be legal voters, of

whom seventeen are Democrats and seven Republicans. It is the ward where I lived at the time, and these are my convictions; but, of course, the committee will confine themselves to the evidence, of which I invite a careful examination. While there were many Republicans who did not and could not vote, the aggregate vote was one hundred and four more than all the voters in the ward, as since ascertained by registering under new law of the State.

Third. "*Grosse Pointe*" *Election.*—The official returns show—

For sitting member - - - - -	189 votes.
For contestant - - - - - -	27 "

These should be rejec ed, for the reason that no election was held, nor were the polls opened within two miles of the place where the election was regularly appointed to be held. (*Vide testimony of George Moran, page* 24; *also, John Corby, page* 57.)

It clearly appears by the testimony that the town, at two successive town meetings, fixed the *place* of holding this election by vote of the town.

In April, 1857, by vote, "*they determined to hold the next year's town meetings and elections at the house of Michael Kline, on the river road.*" (*Vide testimony of John Corby, page* 58, *near the top.*)

Again, in April, 1858, at the election, the town of "Grosse Pointe," designated the same place (Michael Kline's) for the November election. (*Vide testimony of George Moran, page* 24, *near the bottom.*)

Section 17 requires that ten days notice should be given of the time and place of holding the election, by the Town Clerk, by posting in three public places. The witness, Moran, states on cross-examination that he did not see the notices, but he "*understood it was noticed to be held at Wilson's. Such was the current report.*"

He also says the Supervisor told him the Town Board had designated Wilson's place to hold the election at. This is only *hearsay*, and is not *evidence*. I suppose the fact was, after the arrangement between Wilson and Kline, the Town Board consented to go there and open the polls, as they were separately and at different times informed of his arrangements by him. This is probably what the Supervisor meant by telling Moran the Board had "*designated*" Wilson's.

A subpœna was regularly served on Charles Chovin, the Town Clerk, but he did not appear.

There is no evidence, then, except hearsay, to show whether any notices were posted at all, and if they were, whether they noticed the election at Kline's or Wilson's. Either way, the error is fatal; for if the notice was for holding election at Wilson's, it was contrary to the appointment fixed by the vote of the town, at two successive town meetings, and was no notice at all. *It was utterly void.* But if the notice named Kline's as the place, then the notice was right and legal, but the election was at Wilson's, contrary to the notice.

There is no evidence except this hearsay statement about it. But if the fact were proved that notice was given for *either* place or *both*

places, it would still be true that the election was in the one case *without* legal notice, and in the other *contrary* to legal notice.

The Town Clerk was required to give notice "of the time and place." He was to give the *time* as fixed by the *statute*, the *place* as fixed by the town. His duties were executive and clerical. He could not determine or appoint either; he must give both as they had already been determined by the very power that made him Clerk.

Section 508 relates to the *place* of holding township meetings. It reads as follows: "*The annual and special township meetings shall severally be held at the place in the township where the last annual township meeting was held, or at such other place therein as shall have been ordered at a previous meeting; or, when there has been no such previous meeting, at such place as shall be directed in the act or proceeding by which the township was organized, unless it shall, in either case, become inconvenient to do so.*"

Sec. 509. "*Whenever it shall become inconvenient to hold a township meeting at the place designated therefor, the Board of Inspectors, or a majority of them, after having assembled at or as near as practicable to such place, and opened the meeting, and before receiving any votes, may adjourn said meeting to the nearest convenient place for holding the same, and at such adjourned place forthwith proceed with the meeting.*"

These are all the provisions of the statutes on the subject of fixing the place of holding township meetings.

The general election is, so far as the town is concerned, or the means of taking the vote of the township, nothing more or less than a *township meeting*. They have the same inspectors, and vote in the same way as for their more important town officers.

These sections are general, and their application is not limited by the business to be done at the meeting. They apply as fully to the election in November, at which State and county officers are to be elected, as to the spring election, at which town officers are to be chosen by ballot under the same "Board of Inspectors."

That this was the *view* and *intention* of the Legislature, is evident from the fact that the statute is silent on the subject of fixing the place of election in the townships, unless it be embraced in these sections.

Nor have the Township Board any power over the subject, except what is given to them in the 509th section.

The powers and duties of Township Boards are fully set forth in sections 562 to 567, inclusive, pages 239, 240.

They are not *permitted*, much less *required*, to do anything about it, except as in section 509.

If, then, the committee should hold that sections 508 and 509 did not apply to the November elections, then the statutes would be found to be entirely silent as to the mode of fixing the place of said election. And, as the statutes neither *permit*, or *authorize*, or require the *Board* to do anything about it in any such case, how could they, by any action of theirs, change the place after it had been regularly fixed by a vote

of the town, and this in accordance with what is proved to be the regular custom?

The place had been fixed by a vote of the town, by the same authority that created the Town *Board*. The Town Board are the agents of the town, and they cannot annul the action of the town unless authority had been given them *by* the *town* or by the *statute;* neither of which is true.

If, then, the Board took any action on the subject, different from that pointed out in section 509, such *action* was a *nullity*. And if section 509 does not apply to this case, then their action was *void*, even if done according to section 509.

I submit this is an *error of substance*. It is not a mere *irregularity*, an *informality*, but a fatal error—as fatal as to have held an election on some other day, in some other month, unknown to the law.

At most, it was only a town caucus, without authority of law.

If the votes of any one of *these three* precincts be thrown out, it will leave a majority for contestant.

If they all be rejected, it will make his majority 425. I do not see how any of them can be retained upon any principle that should obtain in such cases.

Fourth. But even if it were possible to retain them all, and should the committee *reject* none of them, I claim, in the fourth place, to have proved illegal votes enough cast for the sitting member, *one* by *one*, by evidence that ought to be satisfactory, to more than overcome his apparent majority, and establish my right to the seat.

Before submitting the lists in detail, I wish to call the attention of the committee to the testimony of Howrigan, pages 15, 16.

This crowd was collected and *dead-headed* as to board and grog, under the idea entertained by Mr. Howrigan, a naturalized Irishman, and of course an able expounder of our Constitution and laws, that ten days *presence* made ten days residence, and entitled them to vote; and this, it seems, whether they were legal voters or not in other wards or counties; whether they were unnaturalized foreigners, or vagabonds and loafers; whether from other parts of Michigan, or Ohio, or even Canada. (*As to qualifications of voters, vide section* 1, *article* 7, *of Constitution of Michigan.*)

Need I stop to prove to this committee that *intention* is of the very *essence of residence?* The *intention* of *remaining* is the main thing that distinguishes between *residence* and *mere presence*.

Members of Congress come here and stay, for months together, without gaining residence *here*, or losing it at home. They come for a purpose, and not to make this a home for all purposes. Their staying *here* does not make a new residence, nor destroy the old one. (*Vide* 9 *Tanner's Indiana R.*, 477, *note.*)

No one, I apprehend, will seriously deny the correctness of this principle. Least of all will the sitting member deny it.

It is well known in Michigan that the sitting member had not resided in Michigan for months, at the time he was nominated, but at that very time was residing, or at least staying, in St. Louis. If mere *presence*

make *residence*, he was at that very time a resident of Missouri, and not of Michigan. He had been there for months. His daily employment was there. His domicil was there, and, as he is, like many of the Howrigan voters, an unmarried man, he had no home in Michigan, and his own vote at this election was illegal, and he was ineligible to a seat as Representative in this House from the first district of Michigan.

It has been asserted that he voted in the 5th ward at St. Louis, in August, 1858, and that his number is 1,645 in the returned list in the Missouri case, now before this committee. I do not know whether he voted or not, nor do I care. It certainly is not proved in this case. But I do say, if the mere *presence* of the Howrigan men in the second ward, under a contract to sell their votes for ten days *board and grog*, gave them a residence in said ward, then it follows, irresistibly, that six months *presence* of the sitting member in Missouri, engaged in regular daily employment there, at a yearly salary, *would* and *did* lose him his residence in Michigan, and make him ineligible to a seat here, whether he ever voted there or not. All pretended residence, unaccompanied with this one element, is a *fraud*, a *sham*. These men all went there under an arrangement, for a specific purpose; and that purpose to *vote*, with the intention of leaving as soon as they had voted; and they did leave. They never lived in the ward, *before* or *since*. They never intended to remain. Not one of them took any baggage of any kind into the ward, and but one of them engaged in any business or employment, and he only to deal out the *grog* to the others during the ten days *drunken debauch*.

The place was, for the time being, a *loafer's paradise*. On Friday before election, they adjourned to Canada, for the purpose of amusing themselves in a *prize fight*. They fetched up in the Canada jail, where they remained until Monday, the day before election, when they were brought out of jail and back to the second ward, by some of the more *patriotic friends* of the sitting member.

But if they were residents and voters in the second ward, why the arrangement to board them at all? If they intended to *remain*, how did it happen that they all left the ward within a week? If it was intended to secure only *legal* votes by these extraordinary means, how does it happen that at least nine-tenths of them were not, and could not be, legal voters anywhere in the State? Nor has one of them ever returned to the ward. Long before the testimony in this case was taken, it was a matter of general notoriety that the votes cast by Howrigan's boarders were to be called in question; and if any one of them had been an honest resident of this small ward, the sitting member could have proved it, and pointed out the place in the ward, and the length of time, and his qualifications as a voter. Yet, twelve months after the testimony is closed, the offer is made to prove, by *ex parte* affidavits, that seven of them were voters in the *city*, but nothing to show that any of them were ever voters in the second ward.

Here, as in the other wards, some of them voted under their *real* names, and some of them under *assumed* names. I submit three lists

of illegal votes, as proved, with references to witnesses' names and the page of the testimony. These lists I have marked No. 1, No. 2, No. 3. No. 1 contains those illegal votes proved to have been cast in the second ward. No. 2 contains those of the fifth ward and Grosse Pointe. No. 3, those of the town of Van Buren.

No. 1.

A careful examination of this list will, I think, satisfy the committee that there are at least *sixty votes* cast for returned member in the second ward, that ought to be deducted.

SECOND WARD OF THE CITY OF DETROIT.

Fourth Point—Illegal Votes.

The following persons voted for the sitting member in the second ward, having no right to vote. (*Vide Thomas Howrigan's testimony, pages* 14, 24.)

Names of illegal voters.	No. on poll list.
1. Jack Smock	449
2. Michael McHugh	111
3. James Martin	21
4. Charles Ryan	472
5. Thomas Payton	154
6. William Wilson (error in printing)	339
7. R. W. Davis	268
8. Bunty Davis (E. B. Davis)	395
9. Henry Hale	85
10. John Collins	93
11. Dominick (Daniel) Gallagher	13
12. Tim. McCarthy	141
13. I. Bennett (Isaac)	452
14. Thomas McCarthy (31)	231
15. John O'Sullivan (*vide S. Larned*)	145
16. Jack Martin	335
17. Thomas Burns	7
18. Pat. Haley	47
19. C. J. Gallagher	143
20. M. Dougherty	66
21. Joseph Barclay	188
22. Dan Tibbitts	142
23. George Baker	246
24. Wm. Miller	247
25. Jerry Sullivan (I do not think he did; *vide Larned's list*)	25
26. John McDonnold	176
27. John Willetts	459
28. Moses Lapointe	301
29. Mat. Coughlin	19
30. C. J. Jubenville	249
31. James McCann	22
32. Pat. Reily	155
33. A. Paterson	86

Names of illegal voters.	No. on poll list.
34. E. O. Keefe	87
35. Harvey Van Meter	193
36. Mike Leddy	458
37. John Crowley	245
38. Pat. Hill	265
39. John Carr	346
40. Joseph Carr	394
41. Pat. Malony	477
42. John Brennan	29
43. Dennis Hanready	28
44. —— Scott (assumed names.)	
45. William Edward.	
46. William Hood.	
47. Carlos De Mill.	
48. John Duffy.	
49. Dennis Howrigan, (*see Larned, p.* 26.)	
50. John Hancock.	
51. Coney Scanlon.	
52. John Larryville.	
53. Nelson King.	
54. Theodore Duryea.	
55. Richard Filben.	
56. Joseph Bowen.	
57. Pat. Silvey.	
58. Michael Loftus.	
59. Joseph Huser.	
60. Antoine Gore.	
61. Thomas Bell.	
62. Thomas Clancey.	

No. 2.

This list will show fourteen illegal votes cast for the sitting member in the fifth ward, besides the twenty-five or thirty Canadians brought in by Orvis.

Also, two votes cast in "Grosse Pointe," two in the eighth ward, and one in the seventh ward.

FIFTH WARD—CITY OF DETROIT.

Smith's List, page 33.

Names of illegal voters.	No. on poll list.
1. Fred. Brooks	299
2. W. Watriss	236
3. C. B. Orvis	478
4. John Smith	54
5. H. Lutika	485

Claimed that from twenty-five to forty should be deducted for Orvis's voters, vide Smith 33, Stowell 52, Edgar 63.

Daniel Corby list, page 56.

John Corby corroborates, page 57.

1. Michael Griner.
2. Andrew Griner.

Edgar's List, page 63.

1. George Williams.
2. Henry Kelly.
3. John Worden.
4. Joel Smith.
5. Joseph Warner.
6. Thomas Simpson.
7. John Folger.
8. Thomas Hughes.
9. John Kolfer.

Three of the above voted in other wards, making -	12
Corby's list - - - - - - - -	2
Smith's list - - - - - - - -	5
Taking lowest number for Canadians brought by Orvis—say - - - - - - - -	25
	44

No. 3.

This list shows four, certainly, and six more, probably, cast for him in Van Buren.

OFFICIAL RETURNS—TOWN OF VAN BUREN.

For sitting member - - - - - - -	163
For contestant - - - - - - - -	104
Majority - - - - - - -	59

By the testimony of David Curr, page 59, there are 269 names on the poll list.

Of these, he identifies 152 well-known Democratic legal voters, and also 105 Republicans.

He names four whom he knows *not* to be voters, and six he is confident are not voters, and two he does not know whether they are voters or not.

There are two more names on the poll list than the number of votes cast for Congress. There is one more Republican (105) than I had votes (104.) So that all the *doubtful* voters and all the *illegal* voters must have voted for the sitting member except *one*, and he did not vote at all.

I submit, then, on four of these there is no doubt about, and cannot on any principle be retained, while the proof will fully justify the rejection of the other six. In all, ten should be rejected.

We have, then, by No. 1 - - - - -	60 votes.
" " No. 2, at least - - - -	44 "
" " No. 3, at least - - - -	4 "
	108

Making in all one hundred and eight that should be rejected, after

giving him the benefit of the doubtful votes in "Van Buren," and taking the smallest number of Canadians in the fifth ward, which would would leave my majority thirty-three, even should the first three propositions be decided in his favor.

Michigan Statutes applicable to the Contested Election Case of Howard vs. *Cooper.*

Compiled Laws of Michigan Vol. I, Chap. 6—vide Secs. (39) 15, (40) 16, (41) 17—read as follows, viz:

"The township clerk, or inspector of elections, receiving either of the notices directed in this act to be delivered to him, shall, by notice in writing, under his hand, give at least ten days notice to the electors of the township or ward, of the time and place at which such election is to be held, and the officers to be chosen; and if the notice is of a general election, at which a vacancy is to be filled, it shall state the name of the person in whose office the vacancy shall have occurred, and that such vacancy will be supplied at such election; and such township clerk or inspector shall cause such notices to be posted up in at least three of the most public places in said township or ward."—*Sec.* (41) 17.

"In case three of such inspectors shall not attend at the opening of the polls, or shall not remain in attendance during the election, the electors present may choose, *viva voce*, such number of such electors as, with the inspector or inspectors present, shall constitute a board of three in number; and such electors, so chosen, *shall be inspectors of that election during the continuance thereof.*"—*Sec.* (43) 19.

"At each adjournment of the poll, the clerks shall, in the presence of the inspectors, compare their respective poll lists, compute and set down the number of votes, and correct all mistakes that may be discovered, according to the decision of the board, until such poll lists shall be made in all respects to correspond."—*Sec.* (54) 30.

"The ballot [box] shall then be opened, and the poll lists placed therein, and the box shall then be locked, and a covering, with a seal, placed over the opening in the lid of the box, and the key delivered to one of the inspectors and the box to another, to be designated by the board."—*Sec.* (55) 31.

"The inspector having the key shall keep it in his possession, and deliver it again to the board at the next opening of the poll; and the inspector having the box shall carefully keep it, without opening or suffering it to be opened, or the seal thereof to be broken or removed, and shall publicly deliver it in that state to the board of inspectors at the next opening of the poll, when the seals shall be broken, and the box opened, the poll lists taken out, and the box again locked."—*Sec.* (56) 32.

"As soon as the poll of the general election shall be finally closed, the inspectors shall immediately proceed to canvass and ascertain the result of the election, unless they shall deem it necessary to adjourn such canvass to some convenient hour of the next day; if the canvass shall be adjourned, the same course shall be observed in rela-

tion to the poll lists, box, and key, as is required in sections thirty-one and thirty-two of this act to be observed upon an adjournment of the poll."—*Sec.* (59) 35.

"The canvass shall be public, and shall commence by a comparison of the poll lists, and a correction of any mistakes that may be found therein, until they shall be found or made to agree."—*Sec.* (60) 36.

"The box shall then be opened, and the ballots contained therein taken out and counted by the inspectors, unopened, except so far as to ascertain whether each ballot is single; and if two or more ballots shall be found so folded together as to present the appearance of a single ballot, they shall be destroyed, when the number shall be found not to agree with the poll lists, as provided in the next section."—*Sec.* (61) 37.

"If the ballots in the box shall be found to exceed in number the whole number of names of electors on the poll lists, they shall be replaced in the box, and one of the inspectors shall publicly draw out and destroy so many ballots therefrom, unopened, as shall be equal to such excess."—*Sec.* (62) 38.

As to the manner of fixing the place of holding town meetings, vide (508) and (509;) as to duties and powers of Town Board, see (562) to (567;) Town Clerk, see (557) to (561.)